A **BEEMER SDN BHD v. MAJLIS BANDARAYA PETALING JAYA**

HIGH COURT MALAYA, SHAH ALAM
VAZEER ALAM MYDIN MEERA J
[JUDICIAL REVIEW NO: 25-26-07-2014]
22 JULY 2019

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CIVIL PROCEDURE: *Judicial review – Certiorari – Municipal Council refused to act on order by Appeal Board to allow applicant's application for planning permission – Applicant sought order of mandamus to compel Municipal Council to comply with Appeal Board's order – Whether court could grant order of certiorari not prayed for – Whether appropriate case to grant relief not prayed for – Whether granting of certiorari order consistent with relief expressly prayed for*

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LOCAL GOVERNMENT: *Local authority – Municipal Council – Application for planning permission to change category of use of building from 'residential' to 'commercial' – Application rejected by Municipal Council – Applicant appealed against Municipal Council's decision to Appeal Board – Appeal Board dismissed appeal but later allowed appeal after re-hearing – Municipal Council refused to act on order by Appeal Board to allow application – Whether Appeal Board's order tainted with illegality – Whether Municipal Council could disregard orders issued by Appeal Board – Town and Country Planning Act 1976, ss. 18 & 26 – National Land Code, ss. 52 & 122*

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The applicant was originally operating its business from the premises located at Jalan Universiti, Petaling Jaya, which were categorised in law as 'residential' ('old premises'). The respondent had approved the change of category of use of the building at the old premises, from 'residential' to 'commercial' in order for the applicant to carry on its business activities. The applicant later shifted its business to premises three lots away from the old premises to operate the same business ('new premises'). Following this move, the applicant applied for planning permission to change the category of use of the building on the new premises, from 'residential' to 'commercial'. However, the respondent rejected the application. Dissatisfied, the applicant appealed against the respondent's decision to the Appeal Board. When its appeal was unsuccessful, the applicant applied for a judicial review of the Appeal Board's decision ('the first judicial review') at the High Court. Allowing the first judicial review, the High Court directed the Appeal Board to re-consider the applicant's appeal. Subsequent to a re-hearing, the Appeal Board allowed the applicant's appeal and ordered the first respondent to issue the planning permission to the applicant ('Appeal Board's order'). However, the respondent refused and/or failed to comply with the Appeal Board's order. This prompted the applicant to apply for a judicial review, at the present High Court, seeking an order of *mandamus* against the respondent in respect of the Appeal Board's order. The

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application for judicial review was allowed and aside from granting an order of *mandamus*, which was prayed for, the present High Court also granted an order of *certiorari*, which was not prayed for. The respondent appealed to the Court of Appeal and the Court of Appeal remitted the case for the present court to consider two issues raised by the respondent, namely: (i) whether an order of *certiorari* could be granted even though it was not prayed for in the judicial review application; and (ii) whether the Appeal Board's order was tainted with illegality by reason of contravention of ss. 18 and 26 of the Town and Country Planning Act 1976 ('Act') and/or ss. 52 and 122 of the National Land Code.

Held (no merit in issues raised by respondent; order of court stands):

(1) The court can issue an order of *certiorari* even if it was not expressly prayed for as the court was at liberty to fashion the appropriate remedy to fit the factual matrix of the case and to grant such relief merits the ends of justice. The court may, in appropriate cases, grant relief that is not prayed for either jointly or in the alternative to other remedies provided it is not inconsistent with the relief that is expressly prayed for. The order of *certiorari* granted by the court was consistent with the main relief sought by the applicant, as it complemented the order of *mandamus* that is prayed for and granted by the court. The order of *certiorari*, in this case, would not have any significant effect on the overall relief granted, as the order of *mandamus* prayed for and granted by the court was sufficient to compel the respondent to comply with the Appeal Board's order, which was the main thrust of the applicant's application for judicial review. (paras 12, 15 & 16)

(2) The Appeal Board made a clear distinction between the use of the new premises as an exhibition hall for the mere display of cars, which was prohibited and the marketing and sale of cars, which was permitted under the Petaling Jaya Local Plan Guidelines Development Control ('guidelines'). Therefore, the condition that the Appeal Board had imposed for the issuance of the planning permission by the applicant was in full conformity with the guidelines and the local plan. The Appeal Board's order was not only consistent with the guidelines, it was also consistent with the past practices of the respondent in giving approval for car showrooms along Jalan Universiti, including to the applicant at the old premises. The applicant intended to use the new premises to carry out the same commercial activity of marketing and selling cars, as in the old premises, which was permitted under the guidelines, as opposed to an exhibition hall which was not permitted. After all, the applicant had, with the previous approval of the respondent, been carrying similar trade on the old premises which was just three lots away from the new premises. This fact had been considered by the Appeal Board in coming to its decision. (paras 20 & 21)

(3) Whilst s. 22(2) of the Act mandates the planning authority to have regard to the local plan for the area in deciding on planning permission, they do not have to slavishly adhere to it. This means that, whilst the local plan is important, it does not mean that anything that does not conform to the local plan must be automatically rejected. The local authority may, nevertheless, still consider and approve such applications. Section 22(2) of the Act merely states that the local authority 'shall take into consideration such matters as are in its opinion expedient or necessary for proper planning and in particular the provisions of the development plan' and not that it shall strictly conform to the local development plan at all cost. Section 18(1) must necessarily be read together with s. 22(2) of the Act. The respondent's argument that the Appeal Board's order was an illegality by reason of contravention of s. 18 of Act was without any merit whatsoever. (paras 23 & 24)

(4) When the policy of allowing residential premises to be used for limited commercial use was formulated by the State and local authorities, the use of the express category of use on the land titles to these properties where addressed. The Pengarah Tanah dan Galian Selangor, *vide* his circular No. 5/2007 ('Circular') has expressly allowed for residential properties that come within the re-zoned limited commercial use areas to be used for commercial purposes provided that the increased quit rent based on the category of use of 'commercial' is paid by the landowner. The Appeal Board has made specific reference to this Circular in the Appeal Board's order. (para 26)

(5) The respondent is a local planning authority on whom planning control is vested by virtue of the provisions of the Act. The Appeal Board is established pursuant to s. 36 of the Act. Thus, the Appeal Board is established by statute to hear and decide appeals against the decision of the local planning authority made under sub-s. 22(3) of the Act, and, in this case, decisions made by the respondent. The Appeal Board can make a variety of orders upon hearing these appeals, and these are provided in sub-s. 23(3) of the Act. One such order that the Appeal Board can make is as stated in sub-s. 23(3)(b) of the Act where the Appeal Board can allow the appeal by directing the local planning authority to grant planning permission subject to such conditions as the Appeal Board thinks fit. This was exactly what the Appeal Board did in the present case in making the Appeal Board's order. There was nothing illegal about that order. (para 28)

(6) As a body inferior to the Appeal Board, the respondent would by the very nature of the statutory regime, have to comply with any orders made by the Appeal Board within its powers under sub-s. 23(3) of the Act. It was not open to the respondent to state that it would not heed the directions of the Appeal Board or carry out the orders of the Appeal Board because it was of the opinion that the order or direction is illegal

or that it contravenes the law. If the local planning authority were allowed to act in this manner and disregard the orders of the Appeal Board, properly made under sub-s. 23(3) of the Act, then the entire legislative scheme and purpose in the Act, as regards the planning regime would be defeated and mayhem would ensue. It was obvious that the respondent had blatantly disregarded the clear and unambiguous terms of the Appeal Board's order by intentionally choosing to impede the rights of the applicant to have the planning permission issued as per the Appeal Board's order. Once the Appeal Board had made its decision to issue the planning permission with conditions, it was the duty and responsibility of the respondent to issue the same in accordance to that order. It was not open to the respondent to re-consider the application and/or to impose fresh conditions for the approval. Otherwise the applications for planning permission could go on forever *ad infinium* without an end. There must be some finality to the application process and that finality was achieved when the Appeal Board made the decision. (para 28)

Case(s) referred to:

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals [1997] 1 CLJ 665 CA ***(refd)***

Jerry WA Dusing & Anor v. Menteri Keselamatan Dalam Negeri Malaysia & Anor [2014] 9 CLJ 321 CA ***(refd)***

KA Sanduran Nehru Ratnam v. I-Berhad [2007] 1 CLJ 347 CA ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

Majlis Perbandaran Subang Jaya v. Visamaya Sdn Bhd & Anor [2015] 7 CLJ 27 CA ***(refd)***

Pentadbir Tanah Daerah, Pontian & Ors v. Ossons Ventures Sdn Bhd [2009] 6 CLJ 713 CA ***(refd)***

Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2002] 2 CLJ 697 CA ***(refd)***

Legislation referred to:

National Land Code, ss. 52, 122

Rules of Court 2012, O. 53 r. 2(3)

Town and Country Planning Act 1976, ss. 18(1), 22(2), (3), 23(3)(b), 26, 36(13)

For the applicant/respondent - Ringo Low & Ting Lee Ping; M/s Ringo Low & Assocs
For the respondent/appellant - Sofiah Omar; M/s Kamaruzaman Arif, Amran & Chong

Reported by Najib Tamby

JUDGMENT

Vazeer Alam Mydin Meera J:

The Remit From The Court Of Appeal

[1] The Court of Appeal remitted this case for this court, which is the court of first instance, to consider two further issues raised by the respondent. The first is whether an order of *certiorari* can be granted even though it is not prayed for as part of the relief sought in the judicial review application. And

A the second is whether the Appeal Board's order dated 11 April 2013 (which is the subject matter of this judicial review) is tainted with illegality by reason of contravention of the provisions of ss. 18 and 26 of the Town and Country Planning Act 1976 and/or s. 52 and 122 of the National Land Code.

Relevant Facts

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[2] The applicant was originally operating its business of selling luxury cars from premises No. 64, Jalan Universiti, Petaling Jaya, Selangor ("old premises"). The old premises' use was categorised in law as 'residential'. The respondent had approved the change of category of use of the building at the old premises from 'residential' to 'commercial', in order for the applicant to carry on its business activities.

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[3] When the tenancy of the old premises expired, the applicant shifted its business to No. 58, Jalan Universiti, Petaling Jaya, Selangor, ("new premises") located three lots away from the old premises along the same road to operate the same business. The applicant, had as before, applied for planning permission from the respondent to change the category of use of the building on new premises from 'residential' to 'commercial'. This time, the respondent rejected that application.

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[4] Dissatisfied, the applicant appealed that decision to the Appeal Board, but was unsuccessful. The applicant then applied for judicial review of the Appeal Board's decision *vide* Kuala Lumpur High Court Suit No. R2-25-448-2010 ("first judicial review").

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[5] The Kuala Lumpur High Court ruled in favour of the applicant and directed the Appeal Board to reconsider the applicant's appeal against the respondent's decision to reject the applicant's application for planning permission in respect of the new premises ("HC Order dated 6 July 2011").

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[6] The respondent appealed the HC Order dated 6 July 2011 to the Court of Appeal but subsequently withdrew the appeal. Hence, the HC Order dated 6 July 2011 subsists.

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[7] The Appeal Board reheard the applicant's appeal and on 11 April 2013 ruled in favour of the applicant ("Appeal Board's order"), as follows:

> ... DAN setelah mendengar hujah lanjutan pihak Perayu dan pihak Responden mengenai *aktiviti penjualan kereta yang telah dijalankan dengan sahnya sebelum ini serta pengakuannya untuk meneruskan aktiviti yang sama DAN aktiviti ini boleh dibenarkan mengikut Garispanduan Kawalan Pembangunan Rancangan Tempatan, Petaling Jaya (Pengubahan 1) No. Warta 1542, bertarikh 14 Januari 2007* MAKA ADALAH DIPERINTAHKAN BAHAWA Kebenaran Merancang bolehlah diberi dengan syarat:
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> a. Premis ini hendaklah digunakan semata-mata untuk mempamerkan kereta-kereta jenisnya untuk jualan tetapi bukan untuk mengadakan Dewan Pameran kereta berbagai kereta lain;
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> b. Membayar cukai taksiran berasaskan premis komersial, selagi lesen itu sah;

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c. membayar cukai tanah tambahan berasaskan tanah itu bukan lagi tanah untuk kediaman tetapi sebagai tapak komersial (menurut Pekeliling Pengarah Tanah dan Galian Selangor Bil 5/2007 bertarikh 29 Mei 2007;

d. Pembetulan dan Pindaan pada alamat lessen Tred Perniagaan dan Perindustrian 2013 Ruj. SN:LPN 003752 hendaklah dibuat daripada alamat No. 64 kepada No. 58, Jalan Universiti, Petaling Jaya;

e. Lesen semasa akan tamat pada 31 Disember 2013;

f. Pihak Perayu hendaklah Tiga bulan sebelum lesen itu tamat sah lakunya untuk memohon pembaharuan;

g. Dan lain-lain syarat yang boleh dikenakan mengikut Lesen Tred Perniagaan dan Perindustrian No. SN:LPN 003752;

DAN Penolakan Kebenaran Merancang bertarikh 8 Januari 2010 hendaklah dibatalkan dan Kebenaran Merancang dikeluarkan sehingga 31 Disember 2013 DAN AKHIR SEKALI TIADA PERINTAH TERHADAP KOS.

[8] The Appeal Board's order is binding on the respondent, and in this regard, s. 36(13) of the Town and Country Planning Act 1976 provides:

(13) An order made by the Appeal Board on the appeal before it shall be final, shall not be called into question in any court, and shall be binding on all parties to the appeal or involved in the matter.

The Appeal Board's order, *inter alia*, found that the applicant's commercial activity was allowed under the Garispanduan Kawalan Pembangunan Rancangan Tempatan, Petaling Jaya (Pengubahan 1), ie, the Petaling Jaya Local Plan Guidelines Development Control ("the Guidelines"), and ordered the respondent to issue the planning permission applied for by the applicant, *albeit* with conditions.

[9] However, despite the applicant's numerous letters seeking the respondent's compliance of the Appeal Board's order, the respondent refused and/or failed to comply with the same. The respondent gave various reasons for its non-compliance of the Appeal Board's order, which is covered in the earlier grounds of judgment dated 14 August 2015.

[10] The applicant then filed this judicial review seeking an order of *mandamus* against the respondent in respect of the Appeal Board's order.

The High Court Order Dated 14 August 2015

[11] The High Court on 14 August 2015 allowed this judicial review and made the following order:

ADALAH DIPERINTAHKAN PADA HARI INI bahawa suatu Perintah *Certiorari* untuk:

(i) membatalkan keputusan Responden yang menolak pembayaran Pemohon untuk memperbaharui Lesen Tred Ruj SN: LPN 00372; dan

A ii) membatalkan keputusan Responden yang menolak permohonan Pemohon untuk meminda/pindah Lesen Tred ke premis yang baru iaitu No. 58, Jalan Universiti, Petaling Jaya, Selangor

DAN ADALAH JUGA DIPERINTAHKAN bahawa suatu Perintah *Mandamus*:

B (i) mengarahkan Responden mengeluarkan Kebenaran Merancang kepada Pemohon;

(ii) mengarahkan Responden membuat pembetulan dan pindaan alamat berdaftar Lesen Tred Pemohon dari No. 64 ke No. 58, Jalan Universiti, Petaling Jaya, Selangor; dan

C (iii) mengarahkan Responden membenarkan Pemohon untuk membayar dan memperbaharui Lesen Tred bagi tahun-tahun yang selanjutnya.

The reasons for that decision is contained in the High Court's grounds of judgment dated 14 August 2015. The respondent appealed that decision to the Court of Appeal. It was at the hearing of that appeal that the respondent D raised the aforementioned two issues, which led to the Court of Appeal remitting the case back to the High Court for its deliberation and decision. The earlier judge who heard and decided the matter is no longer in the Shah Alam High Court, hence with concurrence of parties, I heard further arguments on these two issues and delivered my judgment.

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The Fist Issue

[12] I find that in respect of the first issue, this court can issue an order of *certiorari* even if not expressly prayed for as the court is at liberty to fashion the appropriate remedy to fit the factual matrix of the case, and to grant such F relief as merits the ends of justice. See: *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665; [1996] 1 MLJ 481 CA.

[13] Further O. 53 r. 2(3) of the Rules of Court 2012 provides:

(3) Upon the hearing of an application for judicial review, the Court shall not be confined to the relief claimed by the applicant but may dismiss the G application or make any orders, including an order of injunction or monetary compensation:

Provided that the power to grant an injunction shall be exercised in accordance with the provisions of section 29 of the Government Proceedings Act 1956 [Act 359] and section 54 of the Specific Relief H Act 1950.

And, in *KA Sanduran Nehru a/l Ratnam v. I-Berhad* [2007] 1 CLJ 347; [2007] 2 MLJ 430, the Court of Appeal clarified the powers of the High Court under O. 53 r. 2(3) as follows:

I [30] Incidentally, a question which was posed by us at the hearing of this appeal was in relation to the consequential order made by the learned judge, namely, that the matter be remitted to the Industrial Court 'to be dealt with accordingly before another panel'. It was noted that **no such**

relief was specifically prayed for by the respondent in its application. In relation to this, both parties volunteered to forward written submissions on this issue and thus we adjourned our decision to a date to be fixed.

[31] With regards to this poser and after perusing the written submission forwarded, we came to the view that the learned judge was perfectly correct in ordering that the matter be remitted for readjudication before another Chairman of the Industrial Court. Learned counsel for the respondent argued that having quashed the award, there is nothing more left to be done by the Industrial Court. We do not agree. On this issue, O. 53 r. 2(3) of the Rules of the High Court 1980 read as follows

> Upon the hearing of an application for judicial review, the court shall not be confined to the relief claimed by the applicant but may dismiss the application or make any orders, including an order of injunction or monetary compensation.

Thus, **the High Court pursuant to the above order may make any order upon hearing an application for judicial review and it shall not be confined to the relief claimed.** The learned judge has deemed it appropriate to remit the matter for readjudication. We find nothing wrong with that decision. It was clearly within his powers and we find that he had exercised that discretion judiciously under the circumstances of this instant appeal. (emphasis added)

[14] So the Court of Appeal in *KA Sanduran Nehru Ratnam* had in no uncertain terms affirmed the principle that pursuant to O. 53 r. 2(3), and its inherent powers, the court was empowered to fashion the remedy according to the factual matrix of the case and was not confined merely to the remedy sought in the pleadings. This was consistent with the earlier decision of the Court of Appeal in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2002] 2 CLJ 697; [2002] 2 MLJ 413, where the court held as follows:

> To return to the construction to be given to O. 53 of the RHC, I turn to the second point I wish to make. It is the principle which governs the construction of rules of courts. A rule of court should not be interpreted in such a way as to result in unfairness or produce a manifest injustice: *Bank of America National Trust and Savings Associations v. Chai Yen* [1980] 1 MLJ 198; *Sim Seoh Beng & Anor v. Koperasi Tunas Muda Sungai Ara Bhd* [1995] 1 MLJ 292. So here, a manifest injustice would occur if O. 53 of the RHC is read restrictively so as to permit an applicant to claim a declaration only where he applies for it jointly with some other remedy.
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> I might add that under para 1 of the Schedule to the CJA, which is drawn from art 226 of the Indian Constitution and to which in material parts it is identical, our courts have power to issue such orders and grant such relief as is appropriate to the particular circumstances of a given case.
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> ...
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> Since the *High Court has ample power and jurisdiction to grant appropriate relief after hearing full argument on the substantive motion*, the point about the motion paper suffering from inadequacies of drafting, justifiably made in present case, comes to naught. *If the applicant has asked for remedies which he is*

A *patently not entitled to, but adduces facts and establishes grounds entitling him to relief, it is of course open to the judge hearing the substantive motion to invite arguments on the grant of relief appropriate to the applicant's factual situation.* I must therefore with all the respect, I can gather for Dato' Aziz, reject his argument. (emphasis added)

B **[15]** In addition to that, an order of *certiorari* may also be issued by the court under the "further and/or other relief prayer" in the prayers for relief. This was affirmed by the Court of Appeal in *Pentadbir Tanah Daerah, Pontian & Ors v. Ossons Ventures Sdn Bhd* [2009] 6 CLJ 713; [2009] 6 MLJ 182 when it held:

C [28] Though the prayers in the statement of claim did not specifically pray for the declaration as made by the High Court, the High Court had power to make the declaration because O. 14A r. 2 empowers the court to 'make such order or judgment as it thinks just' upon determination of the question of construction of a document arising in the cause or matter. The order which may be made under O. 14A is not restricted to the prayers D in the statement of claim.

[29] Further, in fairness to the respondent, prayer (18) in *the statement of claim did contain a general prayer which had been upheld by the Federal Court to be effective in allowing courts to make such order as may be necessary to serve the ends of justice.* Prayer (18) reads:

E Lain-lain perintah yang difikirkan suai manfaat oleh mahkamah yang mulia ini.

[30] In *Lim Eng Kay v. Jaafar bin Mohamed Said* [1982] 2 MLJ 156, the plaintiff there had failed to plead pre-trial loss of earnings as special damages, However, the Federal Court held that the prayer for such 'other F relief which the court deems fit to grant' was sufficient to enable the court to make an award of loss of earnings to the plaintiff. It was held by the Federal Court (at p 160) that:

We cannot see how the respondents should be deprived of his right by a purely technical error on the part of his solicitors. In any G case prayer (e) in para (7), 'Any other relief which this honourable court deems fit to grant' must not be treated as a mere ornament to pleadings devoid of any meaning. We think that this prayer should entitle the court to make such an assessment.

Hence, it is well-settled that the court may in appropriate cases grant relief H that is not prayed for, either jointly or in the alternative to other remedies provided that it is not inconsistent with the relief that is expressly prayed for. See also *Jerry WA Dusing & Anor v. Menteri Keselamatan Dalam Negeri Malaysia & Anor* [2014] 9 CLJ 321; [2015] 1 MLJ 675 CA.

[16] In this regard, I find that the order of *certiorari* granted by the court I is consistent with the main relief sought by the applicant, as it complements the order of *mandamus* that is prayed for, and granted by the court. The order of *certiorari*, in this case, will not have any significant effect on the overall relief granted, as the order of *mandamus* prayed for and granted by the court

is sufficient to compel the respondent to comply with the Appeal Board's order, which is the main thrust of the applicant's application for judicial review.

Second Issue

[17] On the issue of illegality, the respondent's argument is that the Appeal Board's order, the compliance of which the applicant is seeking, is illegal since it contravenes:

(i) sections 18 and 26 of the Town and Country Planning Act 1976; and/or

(ii) sections 52 and 122 of the National Land Code

In a gist, the respondent's argument as regards illegality can be divided into two, ie, (i) contravention of the town planning legislation, and (ii) contravention of the Land Code.

Alleged Contravention Of Local Planning Legislation

[18] Now, as regards the allegation of contravention of the town planning legislation, the respondent's argument is that the type of commercial activity carried on by the applicant at the new premises, ie, the marketing and selling of luxury cars, is not sanctioned by the Guidelines. The respondent states that in respect of the approved limited commercial activities along Jalan Universiti, the Guidelines provide as follows:

Jadual A.6: Kegunaan/Aktiviti Bagi Kawasan Perdagangan Terhad (Institusi)

Perdagangan Terhad		
Kegunaan/ Aktiviti	a) Yang Dibenarkan	Senarai aktiviti yang dibenarkan digantikan seperti berikut:- 1. Balai seni lukis 2. Dewan Pameran (kecuali kereta) 3. Rumah orang tua 4. Agensi (perkapalan, berita, pelancongan, iklan, seranta, pemasaran)

[19] The respondent submits that the exhibition of cars at the new premises is expressly disallowed by the Guidelines. Hence, the respondent contends that the Appeal Board's order to the following effect is in contravention of the Guidelines:

A DAN setelah mendengar hujah lanjutan pihak Perayu dan pihak Responden mengenai aktiviti penjualan kereta yang telah dijalankan dengan sahnya sebelum ini serta pengakuannya untuk meneruskan aktiviti yang sama DAN aktiviti ini boleh dibenarkan mengikut Garispanduan Kawalan Pembangunan Rancangan Tempatan, Petaling Jaya (Pengubahan 1) No. Warta 1542, bertarikh 14 Januari 2007 MAKA
B ADALAH DIPERINTAHKAN BAHAWA Kebenaran Merancang bolehlah diberi dengan syarat:-

a. Premis ini hendaklah digunakan semata-mata untuk mempamerkan kereta-kereta jenisnya untuk jualan tetapi bukan untuk mengadakan Dewan Pameran kereta berbagai kereta lain;

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b. Membayar cukai taksiran berasaskan premis komersial, selagi lesen itu sah;

c. membayar cukai tanah tambahan berasaskan tanah itu bukan lagi tanah untuk kediaman tetapi sebagai tapak komersial (menurut Pekeliling Pengarah Tanah dan Galian Selangor Bil 5/2007 bertarikh
D 29 Mei 2007;

The respondent, thus, argues that the Appeal Board's order is a contravention of s. 18(1) of Town and Country Planning Act 1976 that reads:

(1) No person shall use or permit to be used any land or building otherwise than in conformity with the local plan.
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[20] Now, I find the respondent's contention to be wholly misplaced. The Appeal Board has made a clear distinction between the use of the new premises as an exhibition hall (dewan pameran) for the mere display of cars, which is prohibited, and the marketing and sale of cars, which is permitted
F under the Guidelines. Therefore, the condition that the Appeal Board had imposed for the issuance of the planning permission by the applicant is in full conformity with the Guidelines and the local plan.

[21] I find that the Appeal Board's order is not only consistent with the Guidelines, but is also consistent with the past practices of the respondent
G in giving approval for car showrooms along Jalan Universiti, including to the applicant at the old premises. The applicant intends to use the new premises to carry out the same commercial activity of marketing and selling cars, as in the old premises, which is permitted under the Guidelines, as opposed to a "dewan pameran" or exhibition hall which is not permitted. After all the
H applicant had with the previous approval of the respondent been carrying similar trade on the old premises at No. 64, which is just three lots away from the new premises at No. 58 Jalan Universiti. This fact has been considered by the Appeal Board in coming to its decision.

[22] In this regard, it would be apposite to quote from the judgment of the
I learned judge in the first judicial review, where he observed:

> ... From the factual matrix of the present case ... it clearly shows that *the whole of Jalan Universiti is a mixed development of various commercial activities with car show rooms approved for various buildings located on the same road ... For that matter the Old Premises which is just 3 lots away was approved for the same in the year 2005.* Within the immediate vicinity of the New Premises, to the left is a building erected on the premises No. 60 and No. 62 ... which I am sure is not a residential building. From the look of the building it appears to be more of an exhibition centre. No. 54 to the right of the New Premises is a furniture exhibition ... In the circumstances, it is quite difficult to imagine how the New Premises could be preserved as "residential" especially when a new flyover was erected right in front of it.

Similar observation was made by the learned judge, my predecessor who heard substantive arguments on the present judicial review and allowed the application. Hence, the respondent had over the years consistently read the Guidelines to mean that the residential premises along Jalan Universiti were permitted to be used as car showrooms for the marketing and sale of cars. Hence, it is rather perplexing that the respondent would all of a sudden decide to give a new interpretation to the Guidelines and argue that such commercial activities are prohibited. If that was so then all their past approvals for such commercial activities along Jalan Universiti, including the approval for the use of the old premises as a car showroom would have been illegal. That cannot be so.

[23] In this regard, it would be helpful to refer to the observation of the Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Sebaguna Sungai Gelugor dengan Tanggungan* [1999] 3 CLJ 65; [1999] 3 MLJ 1 as regards the provisions of s. 22(2) of the Town and Country Planning Act 1976:

> *The question for decision regarding this part of the case, therefore, is: in considering an application for planning permission for development, what is the status and relevance of the Development Plan?* It is not difficult to cite an anthology of authorities on this question. Our choice is as follows.
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> *By s. 22(2) of the Act, it is provided that in dealing with an application for planning permission, the local planning authority 'shall take into consideration such matters as are in its opinion expedient or necessary for proper planning and in particular, inter alia, the provisions of the Development Plan'.* These statutory provisions are equivalent to s 70(2) of the UK Town and Country Planning Act. In this context, the cases of *Kissell v. Secretary of State for the Environment* (1993) TLR, 22 July at p 32, *Etherridge v. Secretary of State for the Environment* (1991) EGCS 28 *Good v. Epping Forest DC* [1994] 2 All ER 156 and *R v. Westminister City Council, ex p Monahan* [1989] 3 WLR 408 (the *Royal Opera House Covent Garden* case) are relevant and show that the Structure Plan has legal status and cannot be disregarded, as Counsel for the Society implied by his submission.

> *It is also obvious that the statutory requirement in s. 22(2) of the Act, 'to take into consideration' to the provisions of the Development Plan does not mean that the local planning authority must slavishly comply with it. It will suffice if it considers the Development Plan without incurring the obligation to follow it.* (See, *Lord Guest in Simpson v. Edinburgh Corp* [1960] SC 313 *Enfield London Borough Council v. Secretary of State for the Environment* (1974) 233 EG 53). But, note the two situations – not material to the present case – where the planning authority would be debarred from granting planning permission (s. 22(4) of the Act). (emphasis added)

Hence, the Federal Court has stated very clearly that, whilst s. 22(2) of the Town and Country Planning Act 1976 mandates the planning authority to have regard to the local plan for the area in deciding on planning permission, they do not have to slavishly adhere to it. This means that, whilst the local plan is important it does not mean that anything that does not conform to the local plan must be automatically rejected. The local authority may, nevertheless, still consider and approve such applications. Section 22(2) merely states that the local authority "shall take into consideration such matters as are in its opinion expedient or necessary for proper planning and in particular the provisions of the development plan" and not that it shall strictly conform to the local development plan at all cost. In this regard, I agree with submissions of counsel for the applicant that s. 18(1) must necessarily be read together with s. 22(2) of the Town and Country Planning Act 1976.

[24] Thus, I find that the respondent's argument that the Appeal Board's order is an illegality by reason of contravention of s. 18 of the Town and Country Planning Act 1976 is without any merit whatsoever.

Alleged Contravention Of The Land Code

[25] Now, I shall move on to the respondent's argument as regards the alleged contravention of the Land Code, and the respondent's contention that the Appeal Board's order is illegal as it contravenes ss. 52 and 122 of the National Land Code ("NLC"). Section 122 of the NLC provides that the State Authority may pursuant to alienation of any State land under s. 52 of the NLC impose conditions on the use to which any building on the land is to be put. The respondent argues that the land title to the new premises expressly states that the category of use of the land is for residential building and as such, any commercial use of the land or the building, without first amending or converting that express category of use in the title, would be illegal as it would contravene s. 122 of the NLC.

[26] I do not find any merit in this argument. When the policy of allowing residential premises to be used for limited commercial use was formulated by the State and local authorities the use of the express category of use on the land titles to these properties where addressed. The Pengarah Tanah dan Galian Selangor *vide* his Circular No. 5/2007 dated 29 May 2007 has expressly allowed for residential properties that come within the re-zoned

limited commercial use areas to be used for commercial purposes provided that the increased quit rent based on the category of use of "commercial" is paid by the landowner. The Appeal Board has made specific reference to this Circular in the Appeal Board's order in the following terms:

> c. membayar cukai tanah tambahan berasaskan tanah itu bukan lagi tanah untuk kediaman tetapi sebagai tapak komersial (menurut Pekeliling Pengarah Tanah dan Galian Selangor Bil 5/2007 bertarikh 29 Mei 2007);

Hence, the Appeal Board has taken into consideration the requirement imposed by the Director of Land and Mines Selangor in his Circular No. 5/2007 for the applicant to pay the increased quit rent at commercial rates if the new premises is to be used for 'commercial' rather than 'residential' purposes. Thus, it is once more perplexing as to why the respondent is raising this issue of illegality now, when it has been done and dusted on the last occasion. And when the Appeal Board's order is perfectly within the bounds of the law.

[27] In addition to this, the Court of Appeal in *Majlis Perbandaran Subang Jaya v. Visamaya Sdn Bhd & Anor* [2015] 7 CLJ 27; [2015] 5 MLJ 554 held that the Town and Country Planning Act 1976 must be read consistent with the NLC, and if that was not possible, then the provisions of the Town and Country Planning Act 1976, as the later legislation would prevail. Therefore, any use of land which is different from the category that which is expressed on title, by reason of re-zoning by the local authority under the Town and Country Planning Act 1976, cannot be rendered illegal merely by the express category of use on the title. The landowner merely has to pay the increased quit rent for the new category of use, if there is any difference in the quit rent payable. This is the mechanism that is provided in the Pekeliling Pengarah Tanah dan Galian Selangor Bil. 5/2007 dated 29 May 2007, and the respondent is well aware of this.

Respondent's Obligation To Follow The Appeal Board's Order

[28] Before I conclude, there is another disturbing feature in this judicial review, and the position taken by the respondent, that needs to be addressed. The respondent is a local planning authority on whom planning control is vested by virtue of the provisions of the Town and Country Planning Act 1976. The Appeal Board is established pursuant to s. 36 of the same Act. Section 23 of the Town and Country Planning Act 1976 provides:

> (1) An appeal against the decision of the local planning authority made under subsection 22(3) may be made to the Appeal Board within one month from the date of the communication of such decision to him, by:
>
> (a) an applicant for planning permission aggrieved by the decision of the local planning authority to refuse planning permission or by any condition imposed by the local planning authority in granting planning permission; and

A (b) a person who has lodged an objection pursuant to subsection 21(6) and is aggrieved by the decision of the local planning authority in relation to his objection.

(2) In considering an appeal, the Appeal Board shall hear the appellant and the local planning authority.

B **(3) After hearing the appeal, the Appeal Board may make an order:**

(a) confirming the decision of the local planning authority and dismissing the appeal;

(b) **allowing the appeal by direction the local planning authority to grant planning permission absolutely or subject to such conditions as the Appeal Board thinks fit**;

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(c) allowing the appeal by setting aside any planning permission granted; or

(d) allowing the appeal by directing the local planning authority to remove or modify any condition subject to which planning permission has been granted or to replace the condition with such other condition as the Appeal Board thinks fit. (emphasis added)

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Thus, the Appeal Board is established by statute to hear and decide appeals against the decision of the local planning authority made under sub-s. 22(3) of the Act, and in this case, decisions made by the respondent. The Appeal Board can make a variety of orders upon hearing these appeals, and these are provided in sub-s. 23(3) of the Act. One such order that the Appeal Board can make is as stated in sub-s. 23(3)(b) of the Act where the Appeal Board can allow the appeal by directing the local planning authority to grant planning permission subject to such conditions as the Appeal Board thinks fit. And this is exactly what the Appeal Board did in the present case in making the Appeal Board's order. There is nothing illegal about that order. Now, as a body that is inferior to the Appeal Board, the respondent would by the very nature of the statutory regime, have to comply with any orders made by the Appeal Board within its powers under sub-s. 23(3) of the Act. It is not open to the respondent to state that it would not heed the directions of the Appeal Board or carry out the orders of the Appeal Board because it was of the opinion that the order or direction is illegal or that it contravenes the law. Similarly, a Magistrate's Court would have to follow the directions or orders of the High Court upon appeal or review of the Magistrate's Court's judgment or order. It is not open to the Magistrate's Court to refuse compliance on grounds that it thinks that the High Court's order is unlawful or illegal. If the local planning authority were allowed to act in this manner and disregard the orders of the Appeal Board properly made under sub-s. 23(3) of the Act, then the entire legislative scheme and purpose in the Town and Country Planning Act 1976 as regards the planning regime would be defeated and mayhem would ensue. It is obvious to me that the respondent has blatantly disregarded the clear and unambiguous terms of the Appeal

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Board's order by intentionally choosing to impede the rights of the applicant to have the planning permission issued as per the Appeal Board's order. Once the Appeal Board had made its decision to issue the planning permission with conditions, it is the duty and responsibility of the respondent to issue the same in accordance to that order. It is not open to the respondent to re-consider the application and/or to impose fresh conditions for the approval. Otherwise, the applications for planning permission can go on forever *ad infinium* without an end. There must be some finality to the application process and that finality is achieved when the Appeal Board makes the decision.

Conclusion

[29] In the overall, I do not see any merit in the two issues raised by the respondent, nor do I find any reasons to interfere with the High Court's order dated 14 August 2015. Hence, the order of this court dated 14 August 2015 stands. The respondent shall bear the cost of this further proceedings. Cost was fixed at RM20,000 subject to allocator.